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During the Industrial Revolution, the size and complexity of the manufacturing process expanded dramatically. A side effect of the newly industrialized society was the emergence of the industrial injury. The legal system was called upon to resolve an increasing number of tort claims between employers and employees for work-related injuries.[1] In many cases, common law doctrines such as contributory negligence, assumption of the risk, and the fellow servant rule precluded recovery by the injured employee.[2] Nevertheless, employers were faced with growing expenditures for legal fees as well as potential costs of large employee recoveries. In addition, the legal system was burdened by an increase in work-related litigation.

Legislatures in all states reacted to the problems of work-related litigation by enacting workers' compensation statutes.[3] The workers' compensation system balances the interests of both employer and employee by insulating the employer from liability at law, while providing the employee with swift and certain compensation for injuries arising from employment.[4] In addition, judicial efficiency is furthered by a reduction in employment related litigation.

Workers' compensation legislation also effected improved safety in the workplace. Compensation for work-related injuries is assured by a statutory requirement that employers purchase compensation in-

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1. 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §5.20 at 37-39 (1985).

2. Professor Larson estimates that over 83 percent of work-related injuries were uncompensated at common law. *Id.* §4.30 at 27. The doctrine of contributory negligence provides that one who has contributed to his own injury is totally precluded from recovery for the tortious conduct of another. *Id.* Assumption of the risk is a tort defense which disallows recovery for injuries that result from risks that the plaintiff assumed either expressly or impliedly. The industrial employee was regarded by the courts as having assumed all foreseeable risks of the employment. *Id.* at 26-27. The fellow servant rule in essence insulated an employer from liability for employee injuries which resulted solely from the negligence of another employee. *Id.* at 25-26.

3. *Id.* §5.30 at 39. Every state had enacted a workers' compensation statute by 1949. *Id.* All workers' compensation statutes are similar in most essential respects. *Id.* §1.10 at 1-2. These statutes were originally known as "workmen's" compensation laws, but the headings were changed in recognition of the changing role of women in labor, as well as a general attempt to eliminate sexism in statutory language. *See, e.g.,* CAL. LAB. CODE §3200.

4. Johns-Manville Products Corp. v. Contra Costa Superior Court, 27 Cal. 3d 465, 474, 612 P.2d 948, 953, 165 Cal. Rptr. 858, 863 (1980).

surance.[5] The insurance premiums a company pays to support workers' compensation are tied, in part, to the company's overall safety record.[6] The increasing risks of modern employment, however, have outpaced the ability of workers' compensation law to achieve workplace safety. For example, exposure in employment to chemical or nuclear substances may cause injury that is not fully realized for many years after the exposure.[7] The possibility that an employer may become liable for workers' compensation payments in the distant future provides little present incentive to keep the workplace safe from exposure to harmful substances.

Congress and state legislatures have addressed workplace safety through enactment of Occupational Safety and Health Acts (OSHA). While OSHA-type schemes attempt to maintain and enforce basic levels of safety in the workplace,[8] the acts do not provide an employee with a direct remedy for employer violation of the statute.[9] An employee's statutory remedy is restricted to workers' compensation benefits even though the injury does not become apparent until long after the employment relationship terminates.[10] With increasing success, employees have sought tort remedies against employers in addition to ordinary workers' compensation benefits.[11] The judiciary has developed several theories to provide employees with legal means to circumvent the exclusivity provisions of workers' compensation laws.[12]

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5. CAL. LAB. CODE §3700. The consequences of employer failure to insure are severe. First, the employee is entitled to bring a tort action against the employer. *Id.* §3706. In a tort action brought under section 3706, the employer must rebut a statutory presumption of negligence. *Id.* §3708. Finally, the common law defenses of contributory negligence, assumption of the risk, and the fellow servant rule are not available to the employer. *Id.*

6. CAL. INS. CODE §11821(c).

7. *See generally,* Comment, *Monitoring Employees for Genetic Alterations: Is State Regulation Essential?,* 15 PAC. L.J. 349 (1984).

8. *See* 29 U.S.C. §§651-673 (Federal Occupational Safety and Health Act); CAL. LAB. CODE §§6300-7915 (California Occupational Safety and Health Act). The federal act is inapplicable if a state adopts an approved OSHA statute. 29 U.S.C. §667(b).

9. CAL. LAB. CODE §6307 (enforcement of the California Occupational Safety and Health Act is entrusted solely to the Department of Industrial Relations, Division of Occupational Safety and Health); *but cf. id.* §6304.5 (evidence of an employer violation of the California Occupational Safety and Health Act is admissible in an action for personal injury or wrongful death between employee and employer).

10. *Id.* §3601 (exclusive remedy rule).

11. *See, e.g., Johns-Manville,* 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (developing so-called "fraudulent concealment exception" to the exclusive remedy rule). The judiciary, however, is exhibiting resistance to this trend. *See* United States Borax and Chemical Corp. v. Superior Court, 167 Cal. App. 3d 406, 411, 213 Cal. Rptr. 155, 159 (1985). "[The plaintiff's bar's] continual efforts to make end-runs around the exclusivity provisions of the workers' compensation system would be more appropriately addressed to the Legislature . . . ." *Id.*

12. An early judicial exception was the dual capacity doctrine. In essence, dual capacity means that if an employer negligently injures an employee while acting in a capacity other

Since workers' compensation benefits are hardly adequate to compensate an injured employee who has developed cancer or genetic damage[13] as a result of exposure to harmful substances during employment, an employee may attempt a tort action to supplement the workers' compensation recovery. No California court has considered a case in which exposure to harmful substances during employment has resulted in injury manifested subsequent to the termination of employment. A federal court,[14] however, has recently applied California law[15] to an analogous fact pattern.[16] The holding of the court may allow circumvention of workers' compensation exclusivity provisions if adopted by California.

In *Molsbergen v. United States*,[17] the Ninth Circuit Court of Appeals interpreted California law to hold an employer liable in tort for failing to warn a former employee of the dangers of exposure to nuclear radiation, when the danger was discovered after the termination of the employment relationship.[18] The tort of post-employment failure to warn will probably be tested in the near future by employees seeking a lucrative tort recovery instead of workers' compensation benefits.

The purpose of this comment is to determine the viability of the post-discharge failure to warn theory under California law. After summarizing the development of the theory in the federal context,[19] this

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than as employer, the employee may sue the employer in tort. Duprey v. Shane, 39 Cal. 2d 781, 793, 249 P.2d 8, 15 (1952). The fraudulent concealment exception arises when the employee's injuries are aggravated by the employer's wrongful concealment of the existence of the injury and its connection with the employment. *Johns-Manville*, 27 Cal. 3d at 478, 612 P.2d at 956, 165 Cal. Rptr. at 866. *But cf.* CAL. LAB. CODE §3602. The legislature has constricted judicial exceptions. *Id.* The dual capacity exception has been eliminated in all but the products liability context. *Id.* §3602(b)(3). The fraudulent concealment exception has been codified, and thus limited to the statutory language. *Id.* §3602(b)(2).

13. *Cf.* Comment, *supra* note 7 (recommending that the state monitor employees exposed to dangerous substances for genetic alterations).

14. Molsbergen v. United States, 757 F.2d 1016 (9th Cir. 1985), *cert. dismissed*, 106 S. Ct. 30 (1985).

15. *Id.* at 1020. Since there is no California law on point, a federal court is required to make a reasonable determination of what the California Supreme Court would decide if faced with the case. *Id.*

16. The suit in *Molsbergen* was brought by the widow of a veteran who died from cancer. *Id.* at 1017. The issue was whether California law would support a tort action against the government for post-discharge failure to warn of the harmful consequences that could result from exposure to nuclear radiation during military service. *Id.* at 1018.

17. *Id.* at 1016.

18. *Id.* at 1024. The court specifically limited the holding to exposure to nuclear radiation. *Id.* at 1024. The theory behind the holding, however, is not fact-bound. The post-discharge failure to warn theory has been applied in federal cases involving exposure to substances ranging from L.S.D. to Agent Orange. *See infra* notes 30-33 and accompanying text. The requirement that the danger be discovered after the termination of employment was set forth in an earlier case. Broudy v. United States, 722 F.2d 566, 570 (9th Cir. 1983) (*Broudy II*); *see also* Broudy v. United States, 661 F.2d 125, 128-29 (9th Cir. 1981) (*Broudy I*). *See infra* text accompanying notes 62-70 (discussing the *Broudy* holdings).

19. *See infra* text accompanying notes 30-68.

comment will scrutinize the *Molsbergen* analysis of California law relating to post-discharge failure to warn.[20] The post-discharge failure to warn theory will then be related to the employment context.[21] Finally, this comment will argue that the post-discharge failure to warn theory is not viable in the employment context due to many practical shortcomings, as well as to conflicts with existing California law and policy.[22] The solution to the problems arising from exposure to harmful substances during employment requires legislative, rather than judicial, action.[23]

DEVELOPMENT OF POST-DISCHARGE FAILURE TO WARN THEORY IN FEDERAL LAW

In *Feres v. United States*,[24] the United States Supreme Court announced a doctrine which immunizes the federal government from liability under the Federal Tort Claims Act (FTCA)[25] to military personnel who have been injured incident to service.[26] The *Feres* doctrine is analogous to workers' compensation law in that the exclusive remedy for veterans injured during active duty is the Veteran's Benefits Act.[27] The post-discharge failure to warn theory has been utilized in federal case law as a means of circumventing the *Feres* doctrine. A discussion of the evolution of the post-discharge failure to warn theory will demonstrate how future application of the theory by California state courts may circumvent the exclusivity provisions[28] of California workers' compensation law.[29]

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20. *See infra* text accompanying notes 69-94.
21. *See infra* text accompanying notes 95-156.
22. *See infra* text accompanying notes 157-93.
23. *See* Heilman v. United States, 731 F.2d 1104, 1113 (3rd Cir. 1984) (Adams, J. concurring).
24. 340 U.S. 135 (1950).
25. 28 U.S.C. §§2671-2680.
26. *Feres*, 340 U.S. at 146.
27. 38 U.S.C. §§1-5228. The veteran's benefits act is the exclusive remedy since the injured soldier is precluded from bringing an action under the FTCA by *Feres*. *Feres*, 340 U.S. at 146.
28. CAL. LAB. CODE §§3601, 3602.
29. As this topic is discussed only as background for the main focus of the comment, coverage herein will be necessarily brief. Many other articles and law review commentaries have covered the subject in more depth. *See, e.g.*, DeDominicis, *Atomic Vets Take Their Case to Court*, CAL. LAWYER, June 1982, at 29 [hereinafter cited as DeDominicis, *Atomic Vets*]; Comment, *Postdischarge Failure to Warn: Judicial Response to Veterans' Attempts to Circumvent the Feres Doctrine*, 30 VILL. L. REV. 263 (1985) (surveying the more recent cases); Comment, *Solving the Feres Puzzle: A Proposed Analytical Framework for "Incident to Service,"* 15 PAC. L.J. 1181 (1984) [hereinafter cited as Comment, *Solving the Feres Puzzle*] (focus on the meaning of the enigmatic term "incident to service"); Comment, *Judicial Recovery for the Post-Service Tort: A Veteran's Last Battle*, 14 PAC. L.J. 333 (1983) [hereinafter cited as

A. Factual Background

From the late 1940s to the early 1960s, the United States military exposed thousands of service personnel to harmful substances such as nuclear radiation,[30] L.S.D.,[31] mustard gas,[32] and Agent Orange.[33] Awareness of the effects of the health hazards posed by these substances is emerging slowly, years after the mass exposures.[34] Although Congress has authorized a comprehensive system of veteran's benefits,[35] as a practical matter, most veterans have not been compensated through the statutory mechanism due to an inability to establish a causal relationship between the exposure to the substance and the disease.[36] Consequently, many veterans are seeking compensation under the Federal Tort Claims Act.[37]

B. The Feres *Doctrine*

At common law, the federal government enjoyed the benefit of sovereign immunity from suit.[38] Subject to certain exceptions,[39] Congress waived this immunity by enacting the Federal Tort Claims Act

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Comment, *Post-Service Tort*] (survey of post-discharge tort theory); Comment, *Duty to Warn as an Inroad to the Feres Doctrine: A Theory of Tort Recovery for the Veteran*, 43 OHIO ST. L.J. 267 (1982) [hereinafter cited as Comment, *Duty to Warn*]; Comment, *Radiation Injury and the Atomic Veteran: Shifting the Burden of Proof on Factual Causation*, 32 HASTINGS L.J. 933 (1981) [hereinafter cited as Comment, *Shifting the Burden*] (proposing that the government bear the burden of negating causation); Note, *From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH. L. REV. 1099 (1979) [hereinafter cited as Comment, *Post-Service Tort*] (survey of post-discharge tort theory); Comment, *Duty* its abolition).

30. *Molsbergen*, 757 F.2d 1016.

31. Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979).

32. Schnurmann v. United States, 490 F. Supp. 429 (E.D.Va. 1980).

33. In re Agent Orange Product Liability Litigation, 506 F. Supp. 762 (E.D.N.Y. 1980).

34. Comment, *Post-Service Tort, supra* note 29, at 334. The consequences of exposure to these substances include cancer, sterility, and birth defects. *Id.*

35. 38 U.S.C. §§1-5228 (Veterans' Benefits Act).

36. *See infra* notes 163-65 and accompanying text (discussion of problems in proving causation). As of August, 1982, veterans had recovered benefits under the VBA in only 16 of 700 cases. DeDominicis, *Atomic Vets, supra* note 29, at 31. However, recent legislation has allowed veterans who were exposed to nuclear radiation or Agent Orange to receive Veteran's Administration Hospital benefits without a showing of causation. 38 U.S.C. §610(e).

37. 28 U.S.C. §§2671-2680.

38. *Feres*, 340 U.S. at 139.

39. 28 U.S.C. §2680. Section 2680 excepts tort claims arising from the negligence of government officials who are performing discretionary functions. *Id.* §2680(a). In addition, claims based on an intentional tort of a government official may not be prosecuted against the United States under the FTCA. *Id.* §2680(h). Claims arising in foreign countries are also excepted from coverage under the FTCA. *Id.* §2680(k). Further, the federal government is not liable for claims arising during the conduct of military combat. *Id.* §2680(j). Finally, there are several miscellaneous exceptions relating to postal service operations, taxation and other financial matters. *See generally id.* §2680 (listing remaining exceptions to the government's FTCA liability).

(FTCA). Under the FTCA the United States is liable for personal injuries caused by the negligence of government employees, to the same extent that a private person would be in similar circumstances under the law of the place where the tort occurred.[40]

The FTCA does not specifically except claims of service personnel.[41] In 1950, however, the United States Supreme Court decided *Feres v. United States*.[42] *Feres* established the doctrine that the federal government cannot be held liable under the FTCA to service personnel whose injuries "arise out of or are in the course of activity incident to service."[43] By precluding recovery under the FTCA, the *Feres* doctrine in effect sets up the Veteran's Benefits Act as the exclusive remedy for injuries suffered by service personnel during active duty.[44] Confronted with a judicial bar to recovery under the FTCA, as well as a practical inability to recover veterans' benefits, many veterans exposed to harmful substances have been left without a remedy for their injuries. Thus, veterans have attempted to develop theories to circumvent the *Feres* doctrine. At present, the post-discharge tort is paramount among these legal theories.[45]

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40. 28 U.S.C. §2674; *see also* 28 U.S.C. §1346(b) (stating same rule and conferring exclusive jurisdiction on the federal district courts over all FTCA claims). *See infra* text accompanying notes 77-94 (discussing application of California law to a failure to warn claim).

41. *See* 28 U.S.C. §2680. *See also* Brooks v. United States, 337 U.S. 49 (1949). "We are not persuaded that 'any claim' means 'any claim but that of a serviceman.'" *Id.* at 51.

42. 340 U.S. 135 (1950).

43. *Id.* at 146. The *Feres* doctrine has been the subject of scathing criticism from both courts and commentators. *See, e.g.*, Note, *From Feres to Stencel, supra* note 29; Monaco v. United States, 661 F.2d 129, 132 (9th Cir. 1981), *cert. denied*, 456 U.S. 989 (1982). However, the doctrine was solidly reaffirmed by the Supreme Court in 1977. Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977). In the 35 years since *Feres* was decided, Congress has not abolished the doctrine. Chappell v. Wallace, 462 U.S. 296, 304 (1983). Four basic policies underlying the *Feres* doctrine have been identified: (a) the fact that there is no truly analogous private liability; (b) the fact that Congress had already provided no-fault recovery for veterans through the VBA; (c) inconsistent treatment of military claims which would result from applying the law of the place where the tort occurred; (d) deleterious effects on military discipline caused by potential civil liability. Note, *From Feres to Stencel, supra* note 29, at 1101-02. The foremost policy rationale is a judicial perception that potential civil liability would exert deleterious effects on military discipline. *Stencel*, 431 U.S. at 672. *See also Chappell*, 462 U.S. at 304; Hunt v. United States, 636 F.2d 580, 599 (D.C. Cir. 1980). This rationale has curiously aided courts in applying the doctrine not only to deny recovery to veterans themselves, but also to the children of veterans who have suffered genetic defects. *Monaco*, 661 F.2d 129, 134. The discipline rationale has also served as the basis for denying relief to third party claimants for indemnity. *Stencel*, 431 U.S. at 674.

44. *See* Comment, *Duty to Warn, supra* note 29, at 269. The Veteran's Benefits Act is not proving helpful to veterans seeking recovery for injuries caused by exposure to harmful substances. *Id. See also* Comment, *Shifting the Burden, supra* note 28, at 957 (statistics showing Veteran's Administrtion rejected 99 percent of claims for disorders alleged to have been induced by exposure to nuclear radiation). *But cf.* 38 U.S.C. §610(e) (allowing veterans who have been exposed to radiation or Agent Orange to receive hospital benefits without proving causal connection between the symptoms and the exposure).

45. A competing theory of recovery was based on alleged constitutional violations. *See,*

C. The Post-Discharge Tort

The lineage of the post-discharge tort can be traced to the 1954 case of *United States v. Brown*.[46] In *Brown*, the United States Supreme Court held the government liable under the FTCA for medical malpractice in aggravating an injury originally incurred by a serviceman during military service.[47] Seizing on the "incident to service"[48] requirement of the *Feres* doctrine, the *Brown* court held that a tort that occurred after discharge was cognizable under the FTCA.[49] Failure to warn as a post-service tort also emerged in medical malpractice cases.[50] Because the typical cases[51] involved post-discharge failures to warn of ailments caused by service related injuries, the requirement that the alleged tort be independent from negligence occurring during service was easily met.[52] In contrast, when governmental negligence that occurred while the plaintiff was in active service was merely continued after discharge, recovery was denied.[53]

In the context of exposure to harmful substances, veterans had particular difficulty in identifying a separate and independent post-

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e.g., Jaffee v. United States, 663 F.2d 1226 (3d Cir. 1981), *cert. denied*, 456 U.S. 972 (1982). In some circumstances, the Supreme Court has been willing to allow tort recovery directly under the Constitution. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). This theory, however, has been firmly rejected in the context of service-related injuries. *Jaffee*, 663 F.2d at 1235-37; *see also Chappel*, 462 U.S. at 304.

46. 348 U.S. 110 (1954).

47. *Id.* at 113. The plaintiff in *Brown* sustained a knee injury during active duty. After discharge, a Veteran's Administration Hospital negligently aggravated the injury during an operation. *Id.* at 110-11. *See also* Brooks v. United States, 337 U.S. 49 (1948) (holding the government liable for injuries to a serviceman which occurred during his furlough and were unrelated to his military service).

48. *See* Comment, *Solving the Feres Puzzle*, supra note 29 (detailed discussion of the meaning of "incident to service").

49. *Brown*, 348 U.S. at 113. The Court recognized that but for the injury during service, Brown could not have been injured by the V.A. Hospital. *Id.* at 112. However, post-service medical malpractice was sufficiently separate and independent from the original injury to allow recovery. *Id.*

50. *See, e.g.*, Hungerford v. United States, 307 F.2d 9 (9th Cir. 1962) (post-service failure to warn of brain damage caused by combat injury); Schwartz v. United States, 230 F. Supp. 1016 (E.D. Pa. 1964) (post-service failure to warn of presence of known carcinogen implanted in sinal passage during service).

51. *See, e.g.*, Bankston v. United States, 480 F.2d 495 (5th Cir. 1973); Toal v. United States, 438 F.2d 222 (2d Cir. 1971); Shults v. United States; 421 F.2d 170 (5th Cir. 1969).

52. There are two primary reasons for strict adherence to the requirement that the tort must occur after the plaintiff's discharge from service. First, tort recovery for an injury that is wholly separate and independent from military service does not threaten any of the policy factors underlying the *Feres* doctrine. *See supra* note 43. Secondly, the separateness requirement ensures that the plaintiff is not recovering for a *continuing* tort, i.e., that the mere fact of discharge does not operate to circumvent *Feres*. Stanley v. Central Intelligence Agency, 639 F.2d 1146, 1155 (5th Cir. 1981).

53. Henning v. United States, 446 F.2d 774, 778 (3rd Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972); *see also* Wisniewski v. United States, 416 F. Supp. 599 (E.D. Wis. 1976).

discharge tort since the initial exposure occurred during service. Courts reasoned that the exposure itself was tortious, and although the government's failure to warn compounded the injury, the effects merely continued after discharge.[54] A breakthrough came in *Thornwell v. United States*,[55] in which the court allowed an FTCA claim for post-discharge failure to warn in a case involving exposure to L.S.D.

The *Thornwell* court identified an independent post-service tort based upon the differing character of the government's conduct before and after the plaintiff's discharge.[56] The exposure during service was deemed an intentional tort, while the failure to warn was negligent. Therefore, the court reasoned that the post-service failure to warn was an "entirely different tort."[57] While *Thornwell* has drawn some following in the federal courts,[58] most courts have not followed the case.[59]

Rejection of *Thornwell* is based on the recognition that, if the original conduct of the government was tortious at all, the government must have been aware of the risks of exposure. Hence, the duty to warn arose at the time of the exposure and was immediately breached.[60] The failure to warn, therefore, occurred during service and cannot support a circumvention of *Feres*. Post-discharge failure to warn will thus circumvent the *Feres* doctrine only when the exposure during service was entirely innocent.[61]

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54. *Stanley*, 639 F.2d at 1155.

55. 471 F. Supp. 344 (D.D.C. 1979). In *Thornwell*, the military had intentionally exposed the veteran to L.S.D. during service, and after discharge had failed to warn or rescue the veteran from the dangers. *Id.* at 346-47.

56. *Id.* at 351.

57. *Id.*

58. *See, e.g.*, Everett v. United States, 492 F. Supp. 318 (S.D. Ohio, 1980).

59. *See, e.g. Heilman*, 731 F.2d at 1108; Hamilton v. United States, 719 F.2d 1 (1st Cir. 1983); Gaspard v. United States, 713 F.2d 1097, 1101 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2354 (1984); Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982), *cert. denied*, 462 U.S. 1118 (1983); Laswell v. Brown, 683 F.2d 261 (8th Cir. 1982), *cert. denied*, 459 U.S. 1210 (1983).

60. The basic premise in *Thornwell* that the differing character of the original intentional conduct and the subsequent negligence justifies treatment of the acts as separate torts is indeed illogical, but typifies the confusion that post-discharge failure to warn has generated in both bench and bar. *Broudy II*, 722 F.2d at 569. The *Broudy* case arrived at the Ninth Circuit after remand in *Broudy I* because "the trial court's inquiry was misguided." *Id.* In addition, the Government made "several arguments which reveal[ed] its misunderstanding of the *Feres* doctrine and [the] decision in *Broudy I*." *Id.*

61. No analytical distinction exists between situations where the original exposure was either an intentional tort or mere negligence. The mere act of exposing service personnel to substances not known to be harmful to humans is not tortious. Characterizing the conduct as tortious in either case means that, at the time of exposure, the military knew or should have known that the substance was dangerous. The duty to warn arises at the time the defendant knows or should know that the conduct has placed another in jeopardy. RESTATEMENT (SECOND) OF TORTS, §§321-322 (1965).

Broudy v. United States[62] was the first case to reconcile logically the failure to warn theory with the limitations of the *Feres* doctrine. The *Broudy* court allowed an FTCA action based upon post-discharge failure to warn, but success depended upon proof that the government learned of the risk of exposure *after* the plaintiff's discharge from service.[63] The innocent ignorance of the government as to the dangers must have continued until after the particular plaintiff was discharged from service.[64] The failure to warn theory is thus reconciled with *Feres* as the independence of the alleged post-discharge tort is guaranteed. Analytically, this version of the failure to warn theory may prove as effective in circumventing the exclusivity provisions of California workers' compensation law[65] as the theory is in circumventing *Feres*.

While the innocent exposure approach is logically consistent with the original post-discharge tort cases,[66] this approach also presents an almost insurmountable obstacle to recovery. Paradoxically, the government can escape liability by proving that the dangers were known at the time the service personnel were exposed to the harmful substances.[67] Assuming the plaintiff can prove that the government did not learn of the risks of exposure until after discharge from service, the plaintiff must also demonstrate that local law would support a similar claim against a private person.[68] Recently, the Ninth Circuit Court of Appeals considered whether California law would support a claim for failure to warn.

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62. *Broudy I*, 661 F.2d 125; *Broudy II*, 722 F.2d 566. The theory developed in the *Broudy* cases has recently been adopted by the Eleventh Circuit. Cole v. United States, 755 F.2d 873, 880 (11th Cir. 1985).

63. *Broudy I*, 661 F.2d at 128-29; *see also Broudy II*, 722 F.2d at 570.

64. *Broudy II*, 772 F.2d at 570. This additional step is forced by the requirement that the tort occur wholly after discharge. Assuming that the government has not warned the plaintiff by the time of trial, the initial breach of the duty to warn must have occurred at the time the duty arose. In order for the breach to have occurred after discharge, the duty to warn must have arisen after discharge. Therefore, to avoid the constraints of *Feres*, the plaintiff must prove that the government did not learn of the risks of exposure until after the plaintiff's discharge from military service. *Id.* The *Broudy I* analysis thus neatly avoids the pitfalls that were exploited by the numerous cases rejecting *Thornwell*. *See supra* notes 58-61 and accompanying text (cases rejecting *Thornwell*). Though this incarnation of the failure to warn theory is logically sound, it creates many inconsistencies in actual application. *See infra* text accompanying notes 66-67 (discussion of paradoxical effects of the theory).

65. *See infra* notes 157-193 and accompanying text (analysis of the effectiveness of failure to warn theory in the context of workers' compensation).

66. *See supra* note 47 and accompanying text.

67. In Re Consolidated United States Atmospheric Testing Litigation, 616 F. Supp. 759, 779 (N.D. Cal. 1985).

68. 28 U.S.C. §1346(b) (conditioning government tort liability on a finding that a private person, similarly situated, would be liable under the law of the place where the tort occurred).

D. The Molsbergen *Analysis of California Duty to Warn Law*

In *Molsbergen v. U.S.*,[69] the widow of a veteran who died from cancer brought an action for post-discharge failure to warn.[70] *Molsbergen* was the first case in which the question of whether local law would support the post-discharge failure to warn theory was squarely posed.[71] Failure to warn was not tortious at common law. The mere failure to act for another's benefit was not considered wrongful, even when the inaction resulted in harm to another.[72] While the difference between action and inaction is theoretically clear, in practice the distinction is difficult to draw.[73] Early departures from the strict view that there was no duty to aid another involved defendants who were common carriers[74] or who enjoyed a special relationship with the plaintiff.[75] Courts also have had little difficulty finding a duty of affirmative action when the defendant's conduct created the risk to the plaintiff.[76]

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69. 757 F.2d 1016 (9th Cir. 1985), *cert. dismissed*, 106 S. Ct. 30 (1985).

70. *Id.* at 1019.

71. *Id.* at 1020.

72. *See generally,* PROSSER AND KEETON, THE LAW OF TORTS, §56 at 373 (W. Keeton, 5th ed. 1984). The reluctance to penalize nonfeasance was a consequence of a strong judicial policy that the courts should not become "an agency for forcing men to help one another." *Id.*

73. *Id.* at 374. Despite the difficulty in distinguishing between action and inaction, the distinction lingers on. *See, e.g.,* Weirum v. RKO General, Inc., 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1973). To illustrate: a doctor's failure to warn a patient of the harmful effects of treatment is clearly medical malpractice, an affirmative act of negligence. *Toal,* 438 F.2d at 225. On the other hand, the failure of the government to warn service personnel of the dangers of exposure to nuclear radiation is less clearly an affirmative act. *Heilman,* 731 F.2d at 1107. The difficulty in conceptualizing failure to warn as an affirmative act may partially explain the early reluctance of the federal courts to recognize failure to warn as an actionable tort outside the medical malpractice area. *Stanley,* 639 F.2d 1146, 1154.

74. A common carrier is a person or entity providing, for example, transportation or communications services. *See, e.g.,* Middleton v. Whitridge, 108 N.E. 192, 197 (1915).

75. RESTATEMENT (SECOND) OF TORTS §314A (1965). Persons typically held to have a special relationship with the plaintiff sufficient to give rise to an affirmative duty to act are innkeepers. Dove v. Lowden, 47 F. Supp. 546, 548 (W.D. Mo. 1942). Landowners have a similar duty to act. L. S. Ayers Co. v. Hicks, 40 N.E. 2d 334, 337-38 (1942). In addition, the employment relationship gives rise to a duty to act. RESTATEMENT (SECOND) OF TORTS §314B (1965). When the common law imposed a duty to act, the duty applied regardless of whether the defendant's original conduct was negligent or entirely innocent. Parrish v. Atlantic Coast Line Railroad Co., 20 S.E. 2d 299, 303-4 (1942). *See also* RESTATEMENT (SECOND) OF TORTS §§321-322 (1965).

76. Tubbs v. Argus, 225 N.E. 2d 841, 843 (1967). When an actor's prior conduct was innocent, "he is under a duty to exercise reasonable care when, because of a change of circumstances, or further knowledge of the situation which he has acquired, he realizes or should realize that he has created such a risk." RESTATEMENT (SECOND) OF TORTS §321, comment a (1965). *See also* PROSSER AND KEETON, *supra* note 72, §56 at 377. "Where the original danger is created by innocent conduct, . . . there is a general recognition of a duty to take action." *Id.*

Consistent with a trend setting tradition in tort law,[77] California courts have been liberal in finding duties to warn.[78] California courts have gone beyond imposing a duty to warn persons endangered by the defendant's own conduct. Indeed, defendants in certain cirucumstances are required to warn persons endangered by the conduct of third parties.[79] No California court has considered a failure to warn case analogous to the post-discharge tort situation, however, so the *Molsbergen* court was required to anticipate California law.[80] The conclusion of the court that California would impose on the government a duty to warn service personnel of the health hazards of exposure to nuclear radiation[81] is hardly novel since the original conduct of the government, even though innocent, was the source of the risk.[82]

The *Molsbergen* court concluded that California would impose a duty to warn when four factors were present.[83] The first factor is that the defendant must have had knowledge of a risk to another's

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77. *See, e.g.,* Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (landmark strict products liability case); Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied,* 449 U.S. 912 (1980) (market share apportionment of fault).

78. *See* Tarasoff v. Regents of University of California, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (psychologist had duty to warn parents of murder victim that patient had expressed intention of killing the victim); Johnson v. California, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968) (state had duty to warn foster parents of violent tendencies of recently paroled foster child).

79. *See Weirum,* 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (radio station had duty to control conduct of persons responding to a contest, as the contest created a risk of harm to plaintiff and was affirmative misfeasance); Myers v. Quesenberry, 144 Cal. App. 3d 888, 193 Cal. Rptr. 733 (1983) (physician had duty to warn patient who injured plaintiff against driving in an uncontrolled diabetic condition); Johnson v. County of Los Angeles, 143 Cal. App. 3d 298, 191 Cal. Rptr. 704 (1983) (county sheriff had duty to warn decedent's family before releasing suicide-prone decedent from custody).

80. *Molsbergen,* 757 F.2d at 1020. When no state law is on point, a federal court "must make a reasonable determination . . . as to the result that the highest state court would reach if it were deciding the case." *Id.*

81. 757 F.2d at 1020-25. *Molsbergen* is correct as far as the opinion takes the analysis. *See infra* note 154.

82. *See* Tresemer v. Barke, 86 Cal. App. 3d 656, 150 Cal. Rptr. 384 (1978). Because a doctor's action created the risk, *Tresemer* held that the doctor had a duty to warn the patient of newly discovered risks associated with the Dalkon Shield intrauterine device (IUD), even though the physician-patient relationship had not continued. *Id.* at 672, 150 Cal. Rptr. at 394. The case is strong precedent for the imposition of a duty to warn under the *Molsbergen* facts, and is reminiscent of many of the federal failure to warn cases in the medical malpractice context. *See Toal,* 438 F.2d 222.

83. *Molsbergen,* 757 F.2d at 1024. California courts have held that the basic component of legal duty is the foreseeability of harm to the plaintiff. *See, e.g., Tarasoff,* 17 Cal. 3d at 435, 551 P.2d at 342, 131 Cal. Rptr. at 22. "The most important of these considerations in establishing duty is foreseeability." *Id.* The factors cited by the *Molsbergen* court are indicia of the foreseeability of harm to the plaintiff. *Molsbergen,* 757 F.2d at 1024.

health or safety.[84] Secondly, the court noted that the defendant's conduct, though blameless, must have created the risk to the plaintiff.[85] Next, the burden of executing the duty to warn must not have been onerous.[86] Finally, the defendant must have had reason to believe that the warning would have some practical effect.[87] The third and fourth factors are interrelated because if the person subject to the risk is not readily identifiable, a general warning to the populace at large will likely be both onerous and ineffective.[88]

Because the four factors were easily met under the allegations in the *Molsbergen* case,[89] the court held that the government would have a duty to warn under California law.[90] Since federal liability under the FTCA depends upon whether a private person in similar circumstances would be liable under local law,[91] the court drew an analogy between the government and a private employer.[92] The primary defect in the *Molsbergen* analysis arises from the failure of the court to fully consider the implications of this analogy. Though the liability of a private employer is clearly governed by workers' compensation law,[93] the *Molsbergen* court inexplicably ignored this body of law.[94]

California Workers' Compensation Law

The viability of the failure to warn theory under California law necessarily raises the issue of workers' compensation. The compensation provisions are comprehensive[95] and are to be "liberally construed

84. This knowledge must have been acquired after the plaintiff left military service. *See supra* notes 63-65 and accompanying text.

85. *Molsbergen,* 757 F.2d at 1024. Under the analysis of the *Broudy* cases, the defendant's conduct in exposing service personnel to harmful substances is, by definition, innocent. *See supra* note 64 and accompanying text.

86. *Molsbergen,* 757 F.2d at 1024. *See Tarasoff,* 17 Cal. 3d at 434, 551 P.2d at 342, 131 Cal. Rptr. at 22.

87. *Molsbergen,* 757 F.2d at 1024. *See* Thompson v. County of Alameda, 27 Cal. 3d 741, 754-56, 614 P.2d 728, 736, 167 Cal. Rptr. 70, 77-78 (1980).

88. *See Thompson,* 27 Cal. 3d at 755, 614 P.2d at 736, 167 Cal. Rptr. at 77.

89. Since the case was appealed from a dismissal of the complaint, the court treated all allegations as true. *Molsbergen,* 757 F.2d at 1018 n.2.

90. *Id.* at 1024. The court expressly limited its holding to the facts of the case. *Id.*

91. 28 U.S.C. §§1346(b), 2674.

92. *Molsbergen,* 757 F.2d at 1020.

93. *See* Cal. Const. art. XIV, §4.

94. The applicability of workers' compensation to the facts of *Molsbergen* is suggested in *Feres,* 340 U.S. at 143. Discussing the inequities that would result from applying state law to soldiers stationed in different states, the Court noted that "[w]e cannot ignore the fact that most states have abolished the common law action for damages between employer and employee and superseded it with *workman's* [sic] *compensation* statutes which provide, in most instances, the sole basis of liability" (emphasis added). *Id.*

95. Cal. Lab. Code §3201.

by the courts" in favor of employee recovery.[96] If the initial exposure to hazardous substances occurred during employment, the question becomes whether the injuries are covered by the provisions of California workers' compensation law.

A. Workers' Compensation Recovery for Exposure to Hazardous Substances

Under California law, all injuries arising in the course of employment are covered by workers' compensation.[97] In the context of exposure to hazardous substances, the employee may encounter a problem with the statute of limitations, which is one year for most workers' compensation claims.[98] Assuming that the employer has failed to warn the employee of the risks of exposure, the employee may not discover the injury or the connection between the injury and the employment within one year of the initial exposure.[99] California courts, however, have been exceedingly diligent in effectuating the liberal construction provision.[100] The "rule of discovery" is applied in workers' compensation cases.[101] The rule provides that the statute of limitations does not begin to run until the date the employee, or former employee, learns of the nature of the injury and the relationship of the injury to the employment.[102] This interpretation has statutory support,[103] and is accepted in the case law.[104]

Though the statute of limitations will not limit recovery for injuries caused by exposure to hazardous substances, workers' compensation may not adequately compensate the employee for work-related injuries. Damages for pain and suffering as well as for punitive damages are unavailable under workers' compensation law.[105] In addition, workers' compensation benefits are generally limited to medical expenses and lost earnings.[106] Thus, the employee's remedy under the

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96. *Id.* §3202.
97. *Id.* §3600(a).
98. *See id.* §§5400-5412.
99. *Id.* §5405.
100. *Id.* §3202. *See generally* Mastoris, *The Statutes of Limitation in Workers' Compensation Proceedings,* 15 CAL. W. L. REV. 32 (1979).
101. Mastoris, *supra* note 100, at 43.
102. *Id.*
103. *See* CAL. LAB. CODE §5412 (the date of injury for occupational or cumulative injury is the date of discovery).
104. *See* Chambers v. WCAB, 69 Cal. 2d 556, 559-61, 446 P.2d 531, 533-34, 72 Cal. Rptr. 651, 653-54 (1968).
105. Comment, *Johns-Manville Products Corp. v. Superior Court: The Not-So-Exclusive Remedy Rule,* 33 HASTINGS L.J. 263, 267-70 (1981).
106. *See generally* CAL. LAB. CODE §§4650-4755 (setting forth remedies). *But cf.* Renteria

workers' compensation mechanism may be substantially less than actual damages.[107] An employee injured by hazardous substances has a strong incentive to seek a remedy outside the workers' compensation system. In procuring a tort remedy, the employee will have to contend with the exclusivity provision of workers' compensation law.[108]

B. The Exclusive Remedy Rule of Workers' Compensation

The exclusivity provision substitutes the remedies of the workers' compensation statute for those the employee might otherwise have obtained in a tort action against the employer.[109] Underlying the exclusivity provision is a policy of preserving a balance between the interests of employer and employee.[110] The employee is assured relatively swift compensation on a no-fault basis, while the employer receives immunity from liability at law.[111]

While the policy has remained constant, the equities supporting the exclusivity provision have changed over time.[112] When workers' compensation laws were first enacted, employee recovery was virtually foreclosed by the availability of defenses such as contributory negligence, assumption of the risk, and the fellow servant rule.[113] In recent decades, however, tort verdicts have become far easier to secure and the awards more lucrative,[114] while workers' compensation payments have remained relatively low. Consequently, workers' compensation laws, which were once an employee's only guarantee of recovery, now severely limit the recovery the employee might otherwise receive in a tort action. Employees thus have an increasing incentive to attempt to circumvent the exclusivity provision.[115] In this

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v. County of Orange, 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978) (allowing tort claim for intentional infliction of emotional distress because workers' compensation system provided no remedy for non-physical injury incurred in employment).

107. However, the employee may be able to enhance workers' compensation recovery by 50% if the employer's failure to warn can be characterized as "serious and willful misconduct." CAL. LAB. CODE §4553.

108. All workers' compensation statutes contain exclusivity provisions. 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION, §65.00 (1985). *See* CAL. LAB. CODE §§3600, 3601, 3602 (exclusivity provisions of California workers' compensation law).

109. CAL. LAB. CODE §3602.

110. *Johns-Manville,* 27 Cal. 3d at 474, 612 P.2d at 953, 165 Cal. Rptr. at 863.

111. *Id. See* CAL. LAB. CODE §§3600-3602.

112. Comment, *supra* note 105, at 267-70.

113. *See supra* note 2.

114. *See* CAL. LAB. CODE §2801 (abolishing common law defenses of assumption of the risk and the fellow servant rule, and curtailing contributory negligence in actions between employee and employer).

115. Understandably, employers are now advocates of payment of workers' benefits. The current position reflects an ironic shift in attitude. Comment, *supra* note 105, at 266.

respect, the position of an injured employee is analogous to that of former service personnel who are unable to recover adequate benefits from the Veterans Administration.[116] Several statutory or judicial exceptions to the workers' compensation exclusivity provision have been recognized over the years.[117]

C. Exceptions to Exclusivity

In 1952, the California Supreme Court developed an exception to the exclusivity provision known as the "dual capacity" doctrine.[118] The dual capacity doctrine concerns the situation in which the employee's injuries are caused by an employer acting in a capacity other than as an employer.[119] Although the injuries are work-related to the extent that they are inflicted by the employer, the fact that the employer is acting in another capacity allows recovery by the employee in tort.[120] In *Duprey*, for example, a nurse employed by a chiropractor was negligently treated by the chiropractor for an injury.[121] The plaintiff was allowed to sue her employer for malpractice because the employer was acting in the capacity of a doctor rather than an employer.[122] The dual capacity exception also has been applied to cases in which the employer manufactures a product that injures the employee.[123] The application of dual capacity to products liability cases is attractive, since the employer may also be the manufacturer of harmful substances to which the employee is exposed.[124] Dual

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116. *See supra* notes 35-37 and accompanying text.

117. *See* J. MASTORIS, CIVIL LITIGATION AND WORKERS' COMPENSATION, (1980). "Ever since the advent of the Workers' Compensation Act, ingenious attorneys representing injured workers have sought ways and means of obtaining greater benefits than the workers' compensation award." *Id.* at vi.

118. Duprey v. Shane, 39 Cal. 2d 781, 793, 249 P.2d 8, 15 (1952). *See also* Baugh v. Rogers, 24 Cal. 2d 200, 148 P.2d 633 (1944). *See generally,* Comment, *Dual Capacity After A.B. 684,* 11 W. ST. U.L. REV. 59 (1983) (discussing the demise of the dual capacity doctrine).

119. *Duprey,* 39 Cal. 2d at 793, 249 P.2d at 15.

120. *Id.*

121. *Id.* at 785-89, 249 P.2d at 10-13.

122. *Id.* at 793, 249 P.2d at 15.

123. *See, e.g.,* Bell v. Industrial Vangas, Inc., 30 Cal. 3d 268, 637 P.2d 266, 179 Cal. Rptr. 30 (1981). The plaintiff in *Bell* was allowed to sue his employer for products liability when a fire broke out while he was delivering gas packaged and marketed by his employer. *Id.* at 282-83, 637 P.2d at 275, 179 Cal. Rptr. at 39. *See also* Douglas v. E. & J. Gallo Winery, 69 Cal. App. 3d 102, 137 Cal. Rptr. 797 (1977) (employee injured on scaffolding allowed to bring products liability action against employer who manufactured the scaffolding). *See generally,* Note, *Dual Capacity Doctrine: Third-Party Liability of Employer-Manufacturer in Products Liability Litigation,* 12 IND. L. REV. 553 (1979).

124. *See In Re Consolidated Testing Litigation,* 616 F. Supp. at 763-71 (the government contractors in some cases of nuclear testing were both the manufacturer and the employer).

capacity, however, was foreclosed legislatively in 1982,[125] and is no longer viable in most situations.[126]

A second judicially created exception to exclusivity involves a physical assault on the employee by the employer.[127] This exception has been codified and is limited to a "willful physical assault."[128] Employees who have been exposed to harmful substances may encounter difficulty in characterizing the facts of the exposure as a willful physical assault.[129]

Of the remaining exceptions to the exclusivity rule,[130] only the exception created in the seminal case of *Johns-Manville Products Corp. v. Superior Court*[131] may provide a viable theory for employees in the instant context. *Johns-Manville* involved exposure during employment to asbestos, a known health hazard.[132] An employee was allowed to bring a tort action for the aggravation of work-related injuries caused by the employer's fraudulent concealment of the fact that the employee had asbestosis and that the disease was work-related.[133]

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125. CAL. LAB. CODE §3602(a). Section 3602(a) provides that workers' compensation is the exclusive remedy notwithstanding the fact "that either the employee or the employer also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury." *Id.*

126. *Id.* §3602(b)(3). Section 3602(b)(3) allows an action at law for products liability in the unusual situation when an employer manufactures a defective product which is sold to a third party who then provides the product for the employee's use. *Id.* The likelihood of these facts occurring is obviously slim. *See* Comment, *supra* note 118, at 65.

127. *See, e.g.*, Magulio v. Superior Court, 47 Cal. App. 3d 760, 121 Cal. Rptr. 621 (1975); *contra,* Azevedo v. Abel, 264 Cal. App. 2d 451, 70 Cal. Rptr. 710 (1968).

128. CAL. LAB. CODE §3602(b)(1).

129. *But cf.* Barbara A. v. John G., 145 Cal. App. 3d 369, 375, 193 Cal. Rptr. 422, 426 (1983) (a cause of action for battery arises when consent to physical contact is fraudulently induced by the defendant). *See infra* notes 130-150 and accompanying text (discussion of employer fraud).

130. The legislature has codified two additional exceptions to exclusivity, but neither is relevant in the instant context. Labor Code section 3706 allows an action at law "if any employer fails to secure the payment of compensation." CAL. LAB. CODE §3706. Employers have no incentive not to insure, since insurance premiums are always less risky than potential tort liability. *See* Comment, *supra* note 118, at 64. A second statutory exception occurs in the unique situation in which the employer has removed or failed to install safety equipment on a power press. CAL. LAB. CODE §4558.

131. 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858.

132. *Id.* at 469, 612 P.2d at 950, 165 Cal. Rptr. at 860.

133. *Id.* at 478-79, 612 P.2d at 956, 165 Cal. Rptr. at 866. The employer had knowledge of the employee's affliction as a result of an employee health care program. The employer, however, concealed this knowledge from the employee. *Id.* at 469, 612 P.2d at 950, 165 Cal. Rptr. at 860. *See also* Unruh v. Truck Insurance Exchange, 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972) (tort action allowed for insurer's deceit in investigation of workers' compensation claim); Ramey v. General Petroleum Corp., 173 Cal. App. 2d 386, 343 P.2d 787 (1959) (tort action for employer's fraud and conspiracy regarding nature of employee's injury). Both *Unruh* and *Ramey* were heavily relied upon in *Johns-Manville*, 27 Cal. 3d at 475-77, 612 P.2d at 954-56, 165 Cal. Rptr. at 864-65.

The *Johns-Manville* holding has been codified in the California Labor Code.[134]

The similarities between fraudulent concealment and post-discharge failure to warn are several. As in the FTCA cases,[135] the employee is confined under *Johns-Manville* to workers' compensation remedies for the original work-related injury. The employee may seek tort damages only for the aggravation of the injury occasioned by the employer's subsequent conduct, which exceeded the ordinary employment context.[136] Another similarity is that the mere negligence of the employer in treating or failing to provide treatment of an industrial injury is not sufficient to escape the exclusivity provisions.[137] At this point, however, the analogy to FTCA failure to warn claims diverges from the fraudulent concealment exception.

In California, establishing fraud in tort[138] requires proof of intentional misrepresentation,[139] reliance,[140] and injury.[141] These requirements were satisfied by the facts in *Johns-Manville*,[142] as the employer's intentional misrepresentations were intended to induce reliance, in fact induced reliance, and caused injury.[143] Because claims based on misrepresentation are not cognizable under the FTCA,[144] the fraudulent concealment exception is not viable in that context.[145] Fraudulent concealment remains available[146] to the private employee as the basis of a tort action in a case involving exposure to harmful substances during employment. In the employment context, the more lucrative tort

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134. CAL. LAB. CODE §3602(b)(2). Other states are beginning to recognize a fraudulent concealment exception to the exclusive remedy rule. *See, e.g.*, Millison v. E.I. Du Pont de Nemours & Co., 501 A.2d 505, 516-17 (N.J. 1985).

135. *See supra* notes 46-68 and accompanying text.

136. CAL. LAB. CODE §3602(b)(2). The section begins: "Where the employee's injury is aggravated. . . ." *Id.*

137. *See, e.g.*, Hamilton v. U.S., 564 F. Supp. 1147, 1151, *aff'd per curiam*, 719 F.2d 1. (1983).

138. Tort fraud is differentiated from contract fraud. *Compare* CAL. CIV. CODE §§1709-1710 (tort fraud, or "deceit") *with id.* §§1571-1574 (fraud as a contract defense). The definitions, however, are virtually identical. *Id.*, §§1571, 1709.

139. CAL. CIV. CODE §1709. Misrepresentation can occur through suppression of a fact one has a duty to disclose. *Id.* §1710. *See also Barbara A.*, 145 Cal. App. 3d at 375 n.6, 193 Cal. Rptr. at 427 n.6.

140. CAL. CIV. CODE §1709.

141. *Id.*

142. "For the purposes of reviewing the trial court's denial of defendant's motion, we must accept as true the allegations of plaintiff's complaint." 27 Cal. 3d at 470, 612 P.2d at 951, 165 Cal. Rptr. at 861.

143. *Id.* at 469-70, 612 P.2d at 950-51, 165 Cal. Rptr. 860-61.

144. 28 U.S.C. §2680(h).

145. *See* Hungerford v. United States, 192 F. Supp. 581, 584-85, *rev'd on other grounds*, 307 F.2d 99 (1962).

146. CAL. LAB. CODE §3602(b)(2).

recovery[147] does not depend on whether the employer's misconduct occurred during or after the employment relationship.[148]

As the court in *Johns-Manville* noted,[149] proving fraudulent concealment will be very difficult for an employee. The difficulty inheres primarily in the economic disincentive for an employer to risk a tort action by concealing and thereby aggravating an injury that is clearly covered by workers' compensation. When an employee cannot prove fraudulent concealment, the failure to warn theory may be an attractive alternative.[150]

D. The Failure to Warn Theory

The failure to warn theory is as effective in circumventing the exclusivity provisions of workers' compensation law as in circumventing the *Feres* doctrine. Under California workers' compensation law, a primary condition of recovery is that the injury occur during the employment relationship.[151] Unless the statutory conditions for compensation concur, the exclusivity provision has no effect.[152] The failure to warn theory, on the other hand, requires that the tortious conduct of the employer occur entirely after termination of the employment relationship.[153]

A post-discharge failure to warn claim is thus not an exception to the exclusivity rule, but falls totally outside the bounds of California workers' compensation law.[154] To achieve this result, the plaintiff must be able to prove that the failure to warn occurred subsequent to the

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147. Punitive damages can ordinarily be awarded in cases of fraud. CAL. CIV. CODE §3294. The Labor Code, however, limits the damages for fraudulent concealment to "those damages proximately caused by the aggravation." CAL. LAB. CODE §3602(b)(2).

148. No bar similar to *Feres* exists in the context of workers' compensation. When a codified exception to the exclusive remedy rule applies, the timing of the employer's violation is immaterial. In *Johns-Manville,* for example, the employer's fraud occurred while the employee was still working, and allegedly induced the employee to continue working. *Johns-Manville,* 27 Cal. 3d at 469-70, 612 P.2d 950-51, 165 Cal. Rptr. 860-61.

149. "We cannot believe that many employers will aggravate the effects of an industrial injury by not only deliberately concealing its existence but also its connection with the employment." *Id.* at 478, 612 P.2d at 956, 165 Cal. Rptr. at 866.

150. *See Molsbergen,* 757 F.2d at 1018. In the failure to warn context, the employer's conduct must occur after the termination of the employment, but need only be negligent. *Id.*

151. *See* CAL. LAB. CODE §§3600(a), (a)(1), (a)(2).

152. CAL. LAB. CODE §3602(a). In relevant part, section 3602 provides that "where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation is . . . the sole and exclusive remedy of the employee . . . against the employer." *Id.*

153. *See supra* note 49 and accompanying text. The injury occurs at a time when neither employer nor employee is subject to the provisions of the act. *See* CAL. LAB. CODE §3600(a)(1).

154. The consequence is that the *Molsbergen* result is legally correct, even though the court did not consider the implications of workers' compensation. *See supra* notes 89-94 and accompanying text.

termination of the employment relationship.[155] Presumably, the employee's recovery would be limited to the aggravation of the work-related injuries caused by the failure to warn, rather than the original injuries which would be governed by workers' compensation.[156] Legally and logically, the failure to warn theory could produce tort recovery in the proper case. Several considerations, however, counsel against the imposition of liability based upon the post-discharge failure to warn theory.

Deficiencies of Failure to Warn Theory

Due to the specific context in which the post-discharge failure to warn theory was developed, the theory is at once a masterpiece of legal logic and a nightmare in practical application. Use of the theory in the workers' compensation arena would conflict with existing law and would raise several policy objections. These practical and legal problems call into question the viability of the failure to warn approach in the context of tort actions for work-related exposure to harmful substances.

A. Practical Problems

A major difficulty with the failure to warn theory concerns the need to prove that the employer was unaware of the risks of exposure to the harmful substance during the employment relationship.[157] Not only is the plaintiff forced to prove a negative, but the defendant employer is placed in an equally anomalous position. The best strategy for the employer is to offer negligence as a defense by proving that the hazards of the substance were known at the time of exposure.[158] Although this defense has already proven successful in FTCA claims,[159] a jury presumably will be unreceptive to the employer's offer of negligence as a defense.[160] The defense is doubly perilous since overly

155. *Molsbergen,* 757 F.2d at 1019-20.

156. The fraudulent concealment exception limits the plaintiff's tort recovery to the aggravation of the original work-related injury. *Johns-Manville,* 27 Cal. 3d at 478, 612 P.2d at 956, 165 Cal. Rptr. at 866. A similar result obtains under FTCA claims, since the original exposure occurred during active duty and recovery is barred by *Feres. Thornwell,* 471 F. Supp. at 352-53.

157. *See supra* 62-65 and accompanying text.

158. If the employer knew of the risk during employment, the failure to warn occurred at that time and the tort would fall under the provisions of workers' compensation law. *See supra* notes 97-104 and accompanying text.

159. *See Consolidated Testing Litigation,* 616 F. Supp. at 777-79.

160. See 28 U.S.C. §2402. No right to a jury trial exists in an FTCA action against the United States. *Id.*

strenuous proof of its validity may result in the employer running afoul of the fraudulent concealment exception.[161] To the extent that the theory places unfair burdens of proof on both parties, California courts may be unwilling to accept post-employment failure to warn.

Another difficulty arises in proving the basic elements of the tort.[162] Factual causation is an element of all torts.[163] Many employees will no doubt be frustrated in attempts to prove that the initial exposure caused injury.[164] For example, proof that exposure to radiation caused injury in a particular case is complicated by three factors: (1) clinical manifestation of the injury may take decades; (2) cancer induced by radiation cannot be distinguished from cancer induced by other causes; and (3) only circumstantial evidence of causation is available, based upon expert opinion and statistical probability.[165] Proof of aggravation of the injuries by the employer's post-employment failure to warn may be even more elusive.[166] Similarly, proof of damages[167] may frustrate attempts to use failure to warn as a basis of tort liability. Apportioning damages between the injuries caused by the exposure and the aggravation by subsequent failure to warn will be speculative at best. As a practical matter, the problems of proof severely limit the utility of failure to warn theory as a means of circumventing the exclusive remedy rule of workers' compensation.

In addition, the operation of existing California statutes effectively curtails the number of cases in which the failure to warn theory would be viable. The legislature has created an extensive regulatory system for the control of hazardous substances in the workplace.[168] The employer has a statutory duty both to maintain a safe workplace[169]

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161. *See supra* notes 131-149 and accompanying text (discussion of fraudulent concealment).

162. *See* PROSSER AND KEETON, *supra* note 72, §30 at 164-65.

163. *Id.* The plaintiff bears the burden of proof on the five essential elements of an actionable tort. *Id.* The plaintiff must show (1) the defendant had a duty of care; (2) the defendant breached the duty; (3) the defendant's breach of the duty caused the plaintiff's injury; (4) the defendant's conduct proximately caused the plaintiff's injury; and (5) the damages thus caused. *Id.*

164. The difficulty of proving causation has been a major factor in the denial of many claims under the Veteran's Benefits Act. *See supra* notes 35-37 and accompanying text.

165. *See* Comment, *Shifting the Burden, supra* note 29 at 964. The comment advocates shifting the burden of proving causation in FTCA cases to the defendant, based on a line of California case law. *Id.* at 963-72. *See* Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948); Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970); Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980). Although the analysis is persuasive, no case has accepted the argument as of 1986.

166. *See, e.g.*, Sweet v. United States, 528 F. Supp. 1068, 1075-77 (D.S.D. 1981).

167. *See* PROSSER AND KEETON, *supra* note 72, §30 at 164-65.

168. CAL. LAB. CODE §§6360-6399.7. Former section 6399.9, which provided for automatic repeal of these sections as of January 1, 1986, was repealed on September 29, 1985, without substitution of a new termination date. 1985 CAL. LEGIS. SERV. c. 1000, §5 (West).

169. CAL. LAB. CODE §6400.

as well as to "do everything reasonably necessary to protect the life, safety, and health of employees."[170] The employer's duties include a general duty to warn employees of the risks associated with the employment,[171] as well as a specific requirement that the employer notify all employees who have been or are being exposed to toxic or harmful substances.[172] Although an employee does not have a direct legal remedy against the employer for violation of statutory duties,[173] the statutes provide for various civil and criminal penalties.[174] Comprehensive regulation of hazardous substances may indicate legislative intent to preempt the field.

The statutory duties and incentives for compliance, in combination with the problems of proving claims,[175] will certainly limit the practical availability of a post-employment failure to warn claim. The fact that the number of actions may be limited does not necessarily argue against the use of the failure to warn theory in a proper case.[176] The difficult position in which the theory places both defendant and plaintiff[177] may counsel judicial caution in accepting post-employment failure to warn. The most serious objections to the viability of the theory are encountered in the area of law and policy.

B. Legal and Policy Problems

When imposing a new duty, California courts have considered the extent of the burden that imposition of the duty would place on the defendant.[178] Allowing a failure to warn action in the employment context would impose a new duty on employers in that employers would become responsible for a continuing duty to notify former

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170. *Id.* §6401.

171. Arthur v. Merchant's Ice and Cold Storage Co. of Los Angeles, 173 Cal. 646, 105 P. 976 (1909). *See also* RESTATEMENT (SECOND) OF AGENCY §§492, 510 (1957). Breach of the common law duty to warn is compensable under workers' compensation law. *Johns-Manville,* 27 Cal. 3d at 474-75, 612 P.2d at 954, 165 Cal. Rptr. at 864.

172. CAL. LAB. CODE §6408(e). *See also id.* §6398 (employer required to furnish employees who are or may be exposed to a hazardous substance with a material safety data sheet (MSDS) explaining the dangers of the particular substance).

173. *See* CAL. LAB. CODE §6307.

174. *Id.* §§6423-6435. However, evidence of employer violation of statute is admissible in a workers' compensation or tort claim by an injured employee. *Id.* §6304.5.

175. *See supra* notes 161-67 and accompanying text (discussing difficulty of proving a failure to warn claim).

176. The fraudulent concealment exception suffers from similar limitations due to specific factual requirements. *See supra* notes 138-49 and accompanying text.

177. *See supra* notes 157-66 and accompanying text (plaintiff must prove a negative and defendant's best defense is negligence).

178. *See supra* notes 83-88 and accompanying text (four factors considered in imposing a duty to warn).

employees of newly discovered risks. In order to carry out this duty, employers would be required to keep vast employment records in perpetuity. The records would necessarily have to include information on the dates, location, and nature of every position held by each employee. Unlike the military,[179] private employers are under no statutory duty to maintain records sufficiently accurate to perform a duty to warn. In addition to the cost of maintaining the records, the costs of notifying all employees potentially at risk also could be significant. Taken in conjunction with the existence of a thorough regulatory scheme concerning hazardous substances in the workplace,[180] the onerous burden on employers favors a policy against the imposition of a duty to warn former employees.

Aside from the burden on the employer that would result from imposing a new duty to warn, recent years have witnessed a trend on the part of both the judiciary[181] and the legislature[182] to limit exceptions to the exclusivity rule. Since workers' compensation benefits are available for injuries from exposure to hazardous substances, the incentive for the courts to adopt a post-discharge failure to warn theory is diminished. Standing alone, the fact that workers' compensation benefits are available, or have already been recovered, is not a bar to an additional recovery in tort.[183] In combination with the clear legislative policy of limiting exceptions to the exclusive remedy rule, however, the availability of a workers' compensation recovery counsels against allowing tort recovery outside the workers' compensation system.

Application of the post-employment failure to warn theory, moreover, would create inequities in the remedies available to present and former employees for similar injuries.[184] The inequities result

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179. The federal government is required to keep detailed records on all service personnel. *See, e.g.*, 32 C.F.R. 505.5 (Army recordkeeping procedures).

180. *See supra* notes 168-74 and accompanying text (discussion of statutory regulation of hazardous substances in the workplace).

181. *See U.S. Borax and Chemical Corp.*, 167 Cal. App. 3d at 411, 213 Cal. Rptr. at 158. "In these days of ever shrinking judical resources, the plaintiff's bar would be well advised to heed these [exclusivity] rules." *Id.*

182. *See* 1982 Cal. Stat. c. 922, §4 at 3365. These amendments to sections 3600, 3601 and 3602 of the Labor Code severely restricted exceptions to the exclusivity provisions. *Id. See supra* notes 125-134 and accompanying text (discussion of statutory limits on judicial exceptions).

183. *Johns-Manville*, 27 Cal. 3d at 478-79, 612 P.2d at 956, 165 Cal. Rptr. at 866. The general rule is that workers' compensation benefits recovered will be set off against the tort recovery. *Id.*

184. The fraudulent concealment exception to the exclusivity provision, in contrast, is equally available to former and present employees. *See supra* notes 131-150 and accompanying text (discussion of fraudulent concealment exception). Proper use of the exception depends only on the intent, knowledge and conduct of the parties. *Id.*

from the premium the failure to warn theory places on the timing of the employer's breach of the duty to warn.[185] Since the exclusivity provision applies unless the employer's failure to warn occurs after the employment relationship is terminated,[186] the time that the employer learned of the risks of exposure to the hazardous substance becomes crucial to the successful use of the post-employment failure to warn theory.[187] The emphasis on timing means that a former employee may have greater remedies for the similar injuries than a present employee.[188]

The same inequity exists when the employer's failure to warn was intentional, so long as the timing of the employer's knowledge was proper and the conduct did not amount to fraudulent concealment.[189] Without proof of specific intent to injure, the employee cannot recover in tort even with proof that the original exposure was intentional.[190] The use of post-employment failure to warn theory thus produces unfair and irrational inequities to the extent that a former employee has a greater remedy than a present employee.

By affording those who have left employment more extensive remedies than are available to those who remain, the failure to warn claim does nothing to further the clearly expressed legislative policy insuring a safe and healthful workplace.[191] More importantly, allowing use of the theory would frustrate major policies underlying the

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185. *See supra* notes 151-56 and accompanying text (discussion of failure to warn theory).

186. *Id.*

187. The exclusivity provision is inapplicable only if the employer's duty to warn does not arise until after the employment had terminated. *See supra* notes 152-55 and accompanying text.

188. Understanding of this anomaly may be facilitated by consideration of a hypothetical situation. Suppose two employees, *A* and *B*, worked together from 1970-1975 for the *C* Company and were exposed to a substance not known to be hazardous. In 1975, *B* left *C*'s employ, but *A* continued to work for *C* and continued to be exposed to the substance. In 1980, *C* discontinued use of the substance upon learning of the risks. *C* did not warn either *A* or *B* of these risks, but the conduct was only negligent. Since *A* was exposed to the substance for a longer period of time, *A*'s injuries are more severe. Under the failure to warn theory, *B* can recover damages in tort from *C* since *C*'s negligence as to *B* occurred after the termination of employment. Although *A*'s injuries are more severe, *A* is limited to workers' compensation remedies since *C*'s failure to warn *A* occurred during employment.

189. *Johns-Manville,* 27 Cal. 3d at 474, 612 P.2d at 953, 165 Cal. Rptr. at 863. "[S]ection 4553 is the sole remedy for additional compensation against an employer whose employee is injured in the first instance as the result of a deliberate failure to assure that the physical environment of the work place is safe." *Id.*

190. Williams v. International Paper Co., 129 Cal. App. 3d 810, 819, 181 Cal. Rptr. 342, 347 (1982). "If the employee is unable to prove specific intent to injure, he will be precluded from receiving damages and will have to resort to workers' compensation as his only remedy." *Id. Accord,* Wright v. FMC Corporation, 81 Cal. App. 3d 777, 146 Cal. Rptr. 741 (1978); Buttner v. American Bell Telephone Co., 41 Cal. App. 2d 581, 107 P.2d 439 (1940).

191. CAL. LAB. CODE §6300 (stating legislative intent that the OSHA provisions should ensure a safe and healthful workplace).

workers' compensation system by exposing the employer to liability in tort and allowing the employee to recover outside the system.[192] Indeed, as the court in *Johns-Manville* stated with regard to employer failure to warn,

> Such conduct may be characterized as intentional or even deceitful. Yet if an action at law were allowed as a remedy, many cases cognizable under workers' compensation would also be prosecuted outside that system. The focus of the inquiry in a case involving work-related injury would often be not whether the injury arose but the state of knowledge of the employer and the employee regarding the dangerous condition which caused the injury. Such a result would undermine the underlying premise upon which the workers' compensation system is based.[193]

CONCLUSION

Presently, many people are being exposed to toxic substances in employment.[194] The risks of these hazardous agents are not always known, either to the employees or to their employers. Worse yet, the effects of exposure may not become apparent until years after the exposure. By then, irreversible injury may have afflicted both the victims and their offspring.[195]

In federal law, a tort action for post-discharge failure to warn has been developed in the situation involving former service personnel. The emergence of this theory of recovery may induce former employees of private companies to attempt to use the post-employment failure to warn theory to circumvent the limitations of workers' compensation law. Although a workers' compensation remedy is available to an employee who has been injured from exposure to hazardous substances, the failure to warn theory avoids the strictures of workers' compensation by focusing on a tort that occurs after termination of the employment relationship. While the theory seems attractive initially, the use of the failure to warn theory in the context of private employment is fraught with problems.

The theory imposes difficult burdens of proof on both plaintiff and defendant by requiring the former to prove a negative and the

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192. *Johns-Manville,* 27 Cal. 3d at 474, 612 P.2d at 953, 165 Cal. Rptr. at 863.
193. *Id.*
194. Comment, *supra* note 7 at 349-50. In fact, the rate of exposure is increasing. *Id.*
195. *Id.* at 350.

latter to use negligence as a defense. Moreover, while recovery under workers' compensation is relatively swift and sure, the employee will encounter serious difficulties in proving causation and damages under the tort theory. Finally, existing statuory regulation of hazardous substances may limit the incidence of cases in which the employer fails to warn the employee of the risks of exposure. In application, therefore, the post-employment failure to warn theory would pose numerous practical problems and would probably not be available to the great majority of employees injured by exposure to hazardous substances.

More importantly, statutory regulation of hazardous substances and the comprehensive workers' compensation mechanism indicate legislative intent to preempt the field of workplace safety. Recent legislation limiting judicially created exceptions to the exclusive remedy rule bolster this argument. Indeed, a similar trend is emerging in the judiciary. Furthermore, courts have been unwilling to create a new duty when, as here, imposition of the duty would place an onerous burden on the defendant.

Acceptance of the post-employment failure to warn theory would also create inequities in remedies available to former as opposed to present employees. Allowing former employees a greater recovery than current employees does not further the legislative policy of enhancing workplace safety. Most importantly, judicial creation of another exception to the exclusive remedy provision would contravene the major policies of providing swift and certain recovery to employees while limiting employer liability at law. The legislature has reaffirmed a commitment to these policies by limiting or eliminating most judicially created exceptions to the exclusivity rule.

In sum, California courts would be unwise to allow claims for post-employment failure to warn. Recognition of the tort would seriously undermine existing legislative policy, while failing to benefit a significant number of employees exposed to hazardous substances. Since the employment field is heavily regulated, modifications in statutory schemes should be left to the legislative process, which is better able to reconcile the interests of specific groups with the broader public good.

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